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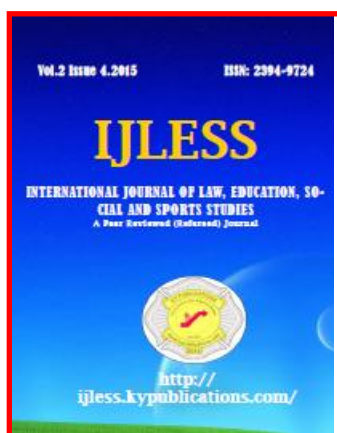
A CRITICAL APPRAISAL OF THE RIGHT OF INHERITANCE OF CHILDREN BORN OUT OF WEDLOCK IN NIGERIA

RESEARCH ARTICLE

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ABSTRACT

The phenomenon of the so-called bastard children has grown astronomically worldwide. In Nigeria, the rights of children born out of wedlock to inherit their biological fathers who died intestate was wholly dependent on the acknowledgement of paternity. This paper attempts to unravel the recent development in the law of inheritance in Nigeria with respect to children born out of wedlock. It concludes from the review of case laws in Nigeria that there is a significant progressive development of the law in Nigeria. Absent acknowledgement of paternity, children born out of wedlock may now inherit their biological fathers if they can provide other evidence of paternity, including the use of DNA technology.

Key Words: Inheritance, children born out of wedlock, paternity

Introduction

One of the incidents of father-child relationship in Nigeria is the right of the child to inherit the property of the father on his death. Where the deceased has more than a child, the children are entitled to inherit his property. The sex of a child is immaterial, so that in inheritance, female children have the right as male children to inherit and partake of the estate of their late father.

The right of inheritance is also available to children born out of wedlock, but for that to happen, the biological father who died intestate must have acknowledged the paternity of the child. A critical appraisal of the phenomenon of inheritance in Nigeria today has shown that children who can prove that the deceased was their biological father may partake of the estate of the deceased who died intestate. Interestingly, judicial authorities on proof of paternity in Nigeria, for the purpose of inheritance, have revealed that any minimal proof is sufficient. Additionally, establishing paternity is now statutory in Nigeria. The objective of this work is to review these judicial authorities and the statutory provision.

The relevance of this work is to show that in Nigeria, the right of a child born out of wedlock to inherit from the deceased father who died intestate inures not only when the paternity of the child was acknowledged by the deceased but on proof that the child was the biological child of the deceased. The theoretical framework of this paper shall be a critical review of the already highlighted progress made in this area of law.

Review of Right of Inheritance of Children Born out of Wedlock in Nigeria

The right of inheritance of children born in the matrimonial home is not a subject matter of debate, doubt or controversy. For several years, the right was reserved for the male children,¹ to the exclusion of the female. The

¹This is the state of affairs in Northern, Southern and Eastern Nigeria. In some cultures, especially among the Ibo of Eastern Nigeria, the males who inherit are the first male children, to the exclusion of other male siblings. Among some cultures of the Ibo, the first

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reason for the discrimination was simply that female children would marry and form a new family with their husband away from their family of birth and therefore need not partake of the estate of their biological fathers.² This reason did not recognize that there was need for them to partake of the estate with their male sibling(s) until they get married. The reason did not also contemplate that the female child may not get married after all.

This discriminatory practice against women in inheritance matters is quite prominent amongst the Ibo tribe of Eastern Nigeria. However, since the Supreme Court decision in *Ukeje v. Ukeje*,³ this practice, especially amongst the Ibos has become an aspect of history. In the words of *Onnoghen* J.S.C, "the Ibo customary law which disentitles a female child from partaking in her deceased father's estate is ... void".⁴ Although this decision was reached on a rule of customary law amongst the Ibos, the pronouncement applies to all rules of customary law in Nigeria that discriminate against daughters in inheritance. This is so because the pronouncement was made on the reasoning that such discriminatory practice "...is in breach of section 42(1) and (2) of the Constitution of the Federal Republic of Nigeria, 1999, a fundamental rights provision guaranteed to every Nigerian".⁵

From the decision in *Ukeje v Ukeje*, the law has now settled for non-discrimination against daughters, on inheritance matters. While the right of inheritance of children born in the matrimonial home is not a subject matter of debate for the obvious reason that they were born by the wife of the deceased living with him, children born out of wedlock are not that lucky. By the fact that they were born out of wedlock, the deceased owes them no legal obligation, as he is not known as their father in the eye of the law. Such children may only demand equal treatment with those born in wedlock, if the deceased acknowledged their paternity during his lifetime. Absent such acknowledgement, children born out of wedlock may not inherit the estate of their deceased biological father. If however, there is an acknowledgement of paternity by the deceased, children born out of wedlock may not be denied any emoluments arising from their biological father any less than children born in the matrimonial home would enjoy, because they both share common paternity, the condition precedent to partaking in the estate of the intestate father. Not only are children born out of wedlock whose paternity have been acknowledged entitled to partake of the estate of the deceased,⁶ they are entitled to so partake in equal shares with those born in the matrimonial home. According to the Nigerian Court of Appeal⁷ in *Okonkwo v. Okonkwo*,⁸

By virtue of section 42 of the Constitution of the Federal Republic of Nigeria 1999, children born out of wedlock but whose paternity was acknowledged by the intestate have equal share with the children of the marriage.⁹

Having established that acknowledgement of paternity brings children born out of wedlock on the same pedestal with those born in the matrimonial home and therefore, bestows on them the right to equal share in the property of their father, it becomes necessary to examine the adverse situation where acknowledgement was not made by the deceased intestate father in his lifetime. Several reasons may account for this situation, including:

male child inherits the property of the father, to the exclusion of all other male siblings, while the last male child inherits the property of the mother to the exclusion of all other male siblings.

² However, in Western Nigeria, females and males inherit in the estate of their deceased father.

³(2014) 11 N.W.L.R (Pt. 1418) 384.

⁴*Ibid*, ratio 4

⁵The said section 42 (1) & (2) states thus:

- (1) A citizen of Nigeria of a particular community, ethnic group, place of origin, sex, religion or political opinion shall not, by reason only that he is such a person –
 - (a) be subjected either expressly by, or in the practical application of, any law in force in Nigeria or any executive or administrative action of the Government, to disabilities or restrictions to which citizens of Nigeria of other communities, ethnic groups, places of origin, sex, religions or political opinions are not made subject, or
 - (b) be accorded either expressly by, or in the practical application of, any law in force in Nigeria or any such executive or administrative action, any privilege or advantage that is not accorded to citizens of Nigeria of other communities, ethnic groups, places of origin, sex, religions or political opinions.
- (2) No citizen of Nigeria shall be subjected to any disability or deprivation merely by reason of the circumstances of his birth.

⁶See *Mgbodu v. Mgbodu* (2015) 12 N.W.L.R (pt 1474) 415 ratio 3 (the Court of Appeal Enugu division stated that: "In Nigeria, once a father acknowledges the paternity of a child whether born in or out of wedlock, the child is regarded as a legitimate child entitled to share in the estate of his/her father").

⁷Enugu Division

⁸(2014) 17 N.W.L.R (Pt.1435) 18.

⁹Ratio 6, per Agube J.C.A, who read the leading judgment with whom Mshelia and Agim J.J. C.A unanimously agreed.

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- i. That non-acknowledgement may avert the obvious trouble arising from the wife and children in the matrimonial home.
- ii. That such acknowledgement may encourage the children born out of wedlock to demand their rights in the affairs of the family, including his burial, which may thus, make his burial an object of quarrel and disagreement.
- iii. That the deceased never even knew that he had the right to acknowledge his children born out of wedlock. This is so because in several tribes of Nigeria, including the Ibo of Eastern Nigeria, the man is not entitled to the paternity of children from a woman on whom he paid no bride price.
- iv. That the mother of the child never disclosed to the deceased during his lifetime that he was responsible for her pregnancy thereby making him unaware of the existence of a child outside wedlock.
- v. That the deceased reserved the acknowledgement for a future date, but died before the future date.

The deceased intestate father cannot abdicate the duty of acknowledgement of paternity of the child born out of wedlock. This is illustrated in the case of *Okonkwo v. Okagbue*.¹⁰ In that case, one Nnanyelugo Nnebedum Okonkwo died intestate in 1931 leaving as surviving sons, the appellant and his four brothers. He was also survived by two sisters (the 1st and 2nd respondents) who married the 3rd respondent for him, thirty years after his death. The 3rd respondent had six children that answer the name of the deceased as their surname and present themselves as the children of the deceased. The appellant as the plaintiff sued at the High Court of Anambra State of Nigeria, sitting at Onitsha,¹¹ seeking in the midst of other reliefs, an order of court that the six children were not those of the deceased and cannot inherit in the estate of the deceased. The plaintiff lost in the suit and appealed to the Court of Appeal¹² where he also lost. He further appealed to the Supreme Court, where the appeal was allowed. On acknowledgement of paternity of the six children of the 3rd respondent as those of the deceased, *Ogundare* SC stated as follows:

It cannot be contested that Okonkwo (deceased) could be the natural father of these children. Yet the 1st and 2nd defendants would want to integrate them into his family.¹³

Furthermore, the learned Justice of the Supreme Court stated that it was better for the children to be informed of who their fathers are (were) rather than making them continue to believe that the deceased who was their father, when he was not. In his words:

It is in the interest of the 3rd defendant's children to let them know who their true fathers are (were) and not to allow them to live for the rest of their lives under the myth that they are the children of a man who died many decades before they were born.¹⁴

Again, where the deceased has not acknowledged the paternity of children, no amount of representation or claim that the children were those of the deceased would make them be. This played out in the case of *Emodi v. Emodi*.¹⁵ In this case, the deceased (Nnanyelugo Umunna Emodi) got married to the 1st respondent in 1977 but the marriage was dissolved by a High Court in 2000. From 1982 to 2000 when the marriage was dissolved, the 1st respondent and the deceased were living apart. There were no children of the marriage. On the death of the deceased in 2000, the issue in contention in the suit was whether the 2nd to 4th respondents¹⁶ who claim to be the children of the deceased were entitled to Letters of Administration to administer the estate of the deceased or the appellants who were the deceased's blood relations. The High Court (of Anambra State of Nigeria sitting at Awka) gave judgment in favour of the respondents, reasoning that the 2nd to 4th respondents were the children of the deceased. The judgment of the court was informed by the following pieces of evidence from the 2nd to 4th respondents:

- (i) That at the ceremony performed on the 14th and 15th days of December, 1993 to initiate the deceased into Agbalanze Society of Onitsha, the 2nd and 3rd respondents performed the "iti obi" by embracing the

¹⁰(1994) 9 N.W.L.R (Pt. 368) 301.

¹¹Presided over by Nwokedi, J.

¹²Enugu Division

¹³At page 343.

¹⁴At page 344.

¹⁵(2015) 2 N.W.L.R (Pt. 1443) 323.

¹⁶Born 1985, 1986 and 1989 respectively.

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- deceased, which under Onitsha native law and custom meant that they were the eldest son and daughter, respectively of the deceased.
- (ii) That when the deceased was alive, he was responsible for the education and welfare of the 2nd to 4th respondents particularly during Christmas and other activities.
 - (iii) That during the funeral rites of the deceased, the 2nd and 3rd respondents were called out as the eldest son and daughter respectively, of the deceased and that they received the purse presented by the Vice President of Agbalanze Onitsha Society.
 - (iv) That the deceased, who was a civil servant, changed his next of kin, from his father, to the 2nd respondent, as the eldest son.

The appellants appealed to the Court of Appeal¹⁷ where the court allowed the appeal, holding *inter alia* that:

in so far as the respondents have sought the grant of letters of administration in this case upon the basis that they are the deceased's children, which they have failed to establish, they are not entitled in priority over the appellants who are the deceased's blood relations.¹⁸

The fact of the case relevant to this paper is that paternity was not conferred on the 2nd to 4th respondents (and the Letters of Administration granted to them) merely because there was elaborate representation as in (i) – (iv) above, that the non-biological children of the deceased were so conferred.

In other to avoid leaving the destiny of children born out of wedlock in the hands of the biological fathers, judicial pronouncements have shown that (in addition to acknowledgement of paternity by the intestate) the paternity of a child can be established by proof. The case of *Ukeje v. Ukeje (supra)*, is illustrative of this point. In that case, one Lazarus Ogbonnaya Ukeje from Umuahia in Abia State of Nigeria (Imo State of Nigeria at the time of the suit) lived most of his life in Lagos State of Nigeria and died thereat, intestate on the 27th day of December 1981, leaving some real property in Lagos State. The deceased got married to the 1st defendant/appellant on the 13th day of December 1956 who begat the 2nd defendant/appellant and three other children for the deceased.

Following the death intestate of the deceased, the 1st and 2nd defendants/appellants (wife and son of the deceased, respectively) applied for and obtained Letters of Administration, to administer the estate of the deceased. The 1st plaintiff/respondent who was begotten for the deceased in Lagos on the 5th day of July 1952 from another woman (the 2nd plaintiff/respondent), sued at the High Court Lagos State of Nigeria¹⁹ seeking *inter alia* an order that the Letters of Administration granted the 1st and 2nd defendants/appellants and dated the 15th day of June, 1982 be revoked and another issued to her and the 2nd defendant/appellant. She also sought a declaration that she was the daughter of the deceased and entitled to partake of the estate of the deceased. She tendered as Exhibit H, the Certificate of Birth issued in evidence of her birth, where the mother (the 2nd plaintiff/respondent) supplied the information thereon, including that the 2nd plaintiff/respondent was the mother of 1st plaintiff/respondent, while the deceased was the father of the 1st plaintiff/respondent. The 1st plaintiff/respondent also tendered the negative and photograph of herself and the deceased between 1978 and 1990, as Exhibits M and M¹ and tendered the photograph of the 2nd plaintiff/respondent and the deceased in the 1950s as Exhibit P. She tendered a guarantor's form filled by the deceased for her, when she wanted to obtain a new Passport, wherein, the deceased acknowledged that he was her father. In the lifetime of the deceased, the 1st plaintiff/respondent married a German national, which marriage was dissolved in a court of law. In the court proceedings, the 1st plaintiff/respondent was referred to as nee Ukeje. A copy of the judgment in the suit was tendered as Exhibit J.

The trial court gave judgment for the plaintiffs/respondents, which was sustained at the Court of Appeal²⁰ and the Supreme Court. On proof of paternity of the 1st plaintiff/respondent (which was one of the issues that featured

¹⁷Enugu Division.

¹⁸Ratio 6. The judgment of the court was within the contemplation of the provision of Administration and Succession (Estate of Deceased Persons Law) Cap 4 Laws of Anambra State of Nigeria, 1991 which provides in its section 96 (2) that in grant of Letters of Administration, the order of priority, include in order of priority, the children of the deceased and the brothers and sisters of whole blood. In this case, the appellants were the brother and sister, respectively, of the deceased.

¹⁹Presided over by Fafiade, J.

²⁰Lagos Division.

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in the three courts and indeed the main issue), the Supreme Court readily agreed with the two lower courts that the 1st plaintiff/respondent was able to prove that she was the daughter of the deceased, entitled to share in his estate.

This case of *Ukeje v. Ukejedi* not only show that the paternity of a child born out of wedlock can be established by proof but proceeded to reveal that the nature of proof could be by tendering of documents. The court gave examples of such evidential documents as:

- (a) Birth Certificate: A birth certificate is a document that contains the date of birth of a person. The contents of birth certificate in the absence of evidence to the contrary is deemed to be true, irrespective of who the person is that gave the information contained therein. What is crucial is that the certificate must have been issued by the person who ought to do so. In the words of the Supreme Court,
a birth certificate is conclusive proof that the person named therein was born on the date stated and the parents are those spelt out in the document. It does not really matter the person who gave information for the birth certificate to be issued... the fact remained that an authorized person issued the birth certificate.²¹
- (b) Photographs: Negatives of photographs and the photographs produced from the negatives that support the believable, oral evidence of a person as to their paternity are sufficient to establish the paternity of a person as vesting on the one that the negative and photographs so represent. In this case, the photograph of the mother of the 1st plaintiff/respondent and the deceased. The Supreme Court stated that although the trial court resolved the issue of paternity in favour of the 1st plaintiff/respondent based on the birth certificate, the photographs might have contributed to the resolution of the issue of paternity in favour of the 1st plaintiff/respondent, by the trial court. According to the Supreme Court,
...on the issue of whether the respondent was the daughter of L.O. Ukeje (deceased), family photographs may have helped to resolve the issue, but the birth certificate of the respondent was decisive in settling the issue.²²
- (c) Forms: Where in filling a form an alleged father has stated that he was the father of the person who allegesto be his child, there is conclusive proof of paternity. On the facts of the case, the deceased filled a guarantor's form for the 1st plaintiff/respondent wherein he stated that he was the father. The court found that "the guarantor's form signed by the deceased (L.O. Ukeje) further showed that the deceased was the father of the respondent".²³

In addition to establishing the paternity of a child by documentary evidence (examples of which have been given to include birth certificates, photographs and forms), the paternity of a child could be proved by scientific tests and results. This has been provided for in the Child's Rights Act.²⁴ According to the Act:

in any civil proceedings in which the paternity or maternity of a person falls to be determined by the court hearing the proceedings, the court may, on application by a party to the proceedings give a direction (*sic*) for the use of scientific tests, including blood tests and Deoxyribonucleic Acid tests to show that a party to the proceedings is or is not the father or mother of that person.²⁵

This provision of the Act shows that scientific tests and results are relevant to establish the paternity as well as the maternity of a person. The phraseology of the provision states that scientific tests could be used to prove paternity or maternity, which gives the impression that the test cannot be employed in intestate proceedings, as the deceased father or mother cannot be party to the proceedings. This narrow interpretation cannot be given to this laudable provision of the Act, because doing so will result to untold hardship and deprivation of the rights of persons

²¹Ratio 2.

²²Ratio 3.

²³*Ibid.*

²⁴Cap C50, Laws of the Federation of Nigeria, 2010.

²⁵*Ibid.*, section 63 (1) (a).

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born out of wedlock. It is suggested that the test should be employed to determine whether the paternity or maternity of a person vests on a party who may or may not be part of the proceedings.²⁶

Summary and Conclusion

The right of children born out of wedlock arises when the intestate parent acknowledges paternity. The acknowledgement certifies such children as qualified to partake of the estate of their common father in equal shares with their siblings born in the matrimonial home. In the absence of acknowledgement there would be no paternity. This has produced the unfortunate circumstance where children born out of wedlock could not partake of the estate of their biological fathers with their siblings born in the matrimonial home. This unfortunate situation has been obviated by the Supreme Court decision in *Ukeje v. Ukejew* which allows paternity to be established by documentary and other evidential methods, including scientific tests as provided in section 63 (1) (a) of the Child's Rights Act.

So far, what now exists is the proof with ease, of the paternity of children born out of wedlock and the readily available right of such children to inherit from the estate of the intestate in equal shares with their siblings born in the matrimonial home. The effect has been the compliance with the constitutional provision that "no citizen of Nigeria shall suffer discrimination due to circumstances of their birth".²⁷ While the state of the law is well appreciated, it is hoped that this would not encourage promiscuity as such act is undoubtedly contrary to public policy.²⁸

²⁶Where the alleged father or mother is alive and participating in the proceedings, a direction may be given by the court for his or her blood sample and that of the claimant be taken and tested and thereafter, the result tendered in evidence. Where on the other hand, the alleged father or mother is late and not participating in the proceedings, a result of the test conducted on the blood sample of the alleged father or mother in his/her life and on the blood sample of the claimant should be tendered and admitted in evidence as well.

²⁷See section 42(2) of the 1999 constitution of the Federal Republic of Nigeria.

²⁸See the unreported case of *Re Adadevoh*, Suit No: AL/68/1952. See also, *Cole v. Aknyele* (1960) 5 F.S.C 84. In *Okonkwo v. Okagbue supra*, Ogundare J.S.C. at page 343 had this to say on the contention that the six children born by the 3rd respondent, thirty years after the death of the deceased were the children of the deceased, "to claim further that the children the 3rd defendant had by other man or men are the children of Okonkwo deceased is nothing but an encouragement to promiscuity ... I have no hesitation in fining that anything that offends against morality is contrary to public policy and repugnant to good conscience.

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